MOTION FILED
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No. 92-626

In The

Supreme Court of the United States

October Term, 1992

CATERPILLAR INC.,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Michigan

MOTION OF ASHLAND OIL, INC. ET AL., FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

BRIEF OF ASHLAND OIL, INC., ET AL., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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LIST OF AMICI CURIAE

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BELOIT CORPORATION
BLACK & DECKER CORPORATION
BP AMERICA INC.
BOB EVANS FARMS, INC.
BRIGGS & STRATTON CORPORATION
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MILES INC.
NATIONAL STEEL CORPORATION
NESTLE FOODS CORPORATION
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amici curiae, Ashland Oil, Inc. et al., hereby respectfully move for leave to file the attached brief amicus curiae in *Caterpillar, Inc* v *Michigan Dep't of Treasury, Revenue Division*, United States Supreme Court Docket No. 92-626. The consent of the attorney for the Petitioner was obtained and has been filed with this Court. Amici requested that the attorney for the Respondent give his consent to the filing of a brief amicus curiae; Respondent's counsel refused to give his consent.

The proposed brief submitted by amici curiae in tandem with the filing of this Motion will assist the Court with its sifting of the arguments advanced by Petitioner in determining whether to grant Petitioner's petition for a writ of certiorari in this highly-significant case, arising under the Commerce Clause of the United States Constitution, art I, § 8, cl 3.

This Court should entertain the proposed brief amici curiae for the following reasons:

(a) Amici, comprising a broad consortium of sixty-one Michigan single business tax taxpayers who seek to add their collective voices to that of the single Petitioner, Caterpillar, represent a diverse cross-section of multistate business entities who stand to be differently affected by the erroneous decision rendered by four Justices of the Michigan Supreme Court in *Caterpillar, Inc* v *Michigan Dep't of Treasury*, 440 Mich 400; 488 NW2d 182 (1992);

(b) Amici curiae have grave concerns that acceptance and perpetuation of the decision rendered by the Michigan Supreme Court majority in *Caterpillar* will erode the concept of federalism, and will encourage the States to enact tax legislation guided by separatist, protectionist notions;

(c) From a jurisprudential perspective, amici have an interest in correcting the errors evident in the decision of the Michigan Supreme Court majority in *Caterpillar* to the extent that the Court patently erred in ignoring longstanding principles which this Court has used to determine whether a legislative enactment violates the Commerce Clause; and

(d) Amici are aware that Michigan likely will relinquish its stand among the fifty States as the only State imposing a value-added tax; indeed, to the extent that several sister States have considered, or are in the process of considering, adoption of a modified value added tax largely modeled after Michigan's statutory scheme, amici as multistate taxpayers may in the future be required to confront the capital acquisition deductions in other contexts.

Resolution of the issue presented in this jurisprudentially-important case will have far reaching consequences to a substantial number of taxpayers other than Petitioner, as exemplified by the numerous taxpayers that comprise the present amici, a wide-ranging consortium of multistate and multinational business enterprises subject to the Michigan single business tax.

Given their diversity, amici are uniquely poised to furnish this Court with in-depth insight into, and a more far-reaching perspective of, the manner in which the capital acquisition deductions of the Michigan Single Business Tax Act ("SBTA"), 1975 PA 228, as amended, MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*, facially, by design and as applied by Respondent, impermissibly discriminate against business entities and activities on the basis of geographic location, and therefore must be struck down under the Commerce Clause.

Respectfully submitted,
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By: _____

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STATEMENT OF INTEREST

In connection with this brief amicus curiae in support of the petition for writ of certiorari filed by Petitioner Caterpillar, Inc. on October 9, 1992, Docket No. 92-626, amici curiae Ashland Oil, Inc. *et al.* have filed a motion for leave to file brief amicus curiae. In this regard, this Court is apprised that, although Petitioner has agreed in writing to permit amici to file a brief supportive of its position[1], Respondent, the Michigan Department of Treasury, Revenue Division, without justification refused to consent to the filing of a brief by these amici.

Several important considerations prompt the submission of this brief on behalf of amici, among them the following:

(1) **Amici comprise a broad consortium of single business taxpayers who seek to add their collective voices to that of the single Petitioner, Caterpillar.** The participants in this amicus brief represent a diverse cross-section of multistate business entities who stand to be differently affected by the erroneous decision rendered by four Justices of the Michigan Supreme Court in *Caterpillar, Inc* v *Michigan Dep't of Treasury*, 440 Mich 400; 488 NW2d 182 (1992), in as many ways as there are distinct business enterprises.

From the perspective of the *geographic breadth* of the business activities of those entities that comprise amici, some undertake only a smattering of business activities within Michigan, while others are significantly committed to this State and maintain a significant business presence here. Just as much diversity can be gleaned from a review of the *types* of businesses that make up this consortium: amici represent a vast range of businesses, from

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[1] A letter indicating Petitioner's written consent to the filing of a brief amicus curiae by Ashland Oil, Inc. *et al.* has been filed with this Court.

those within the manufacturing sector with varying degrees of capital investment in Michigan, to retailers with differential quantities of inventory in this State, to entities whose pursuits are more labor than capital oriented. In addition, certain amici are engaged in foreign commerce, or are subsidiaries of parents domiciled in foreign countries, so that the Foreign Commerce Clause of the United States Constitution, art I, § 8, cl 3, stands to be implicated by the Michigan Supreme Court's *Caterpillar* decision as well. Given the panoramic business outlook of the taxpayers who join in this brief, it can be said that no single voice can be heard above the rest; instead, as a concerted effort, these taxpayers hereby present to the Court their collective concern that, unless a writ of certiorari is granted and the decision of the Michigan Supreme Court reversed, the Michigan Supreme Court majority's skewed vision of the anti-discrimination principles that are to be applied under the Commerce Clause of the United States Constitution, art I, § 8, cl 3, will remain intact.

(2) **In the not-so-distant future, Michigan will relinquish its stand among the fifty States as the only State imposing a value added tax; indeed, several sister States have considered, or are in the process of considering, implementation of a modified value-added tax largely modeled after Michigan's statutory scheme.** Although at present, the single business tax and the novel issues that arise under such a distinctive taxing scheme are unique to Michigan, other States, notably Texas, Florida, Nevada and New Hampshire, have seriously faced, or are now facing, the prospect of enacting modified value added tax systems which, because they are

fashioned after that extant in Michigan[2], undoubtedly will provide for capital acquisition deductions. Thus, in no sense can it be said that the particular problem confronting the Court in this case will have specific pertinence only as to those persons who, by virtue of their business activities in Michigan, are subject to Michigan's single business tax.

(3) **Amici curiae have grave concerns that acceptance and perpetuation of the decision rendered by the Michigan Supreme Court majority in *Caterpillar* will further erode the concept of federalism, and will be viewed by the States as blanket authorization to enact discriminatory legislation motivated by separatist, protectionist notions.** Declining revenues nationwide have prompted the States to reflect upon the need to enact revenue-enhancing measures and, in fashioning them, to provide direct advantages or subsidies, sometimes in the context of creative legislative enactments, either to attract new business or to retain existing business so as to stave off further erosion of their tax bases.[3] Amici submit that this separatist inclination on the part of individual States must be scrutinized with extreme care, and rejected outright in instances in which a stated benign purpose in fostering in-state investment is exposed as nothing more than an effort to accord favored status to businesses with significant presence in a given State. In this regard, amici support Petitioner's invitation to this Court to review this matter to prevent Michigan from "encourag[ing] the

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[2] See, "Daily Report for Executives" (Bureau of National Affairs; July 29, 1992), reporting a consulting firm's advisory to the taxation committee of the National Conference of State Legislatures; according to the article, "[i]n the past year Texas, Florida, Nevada, and New Hampshire have all seriously discussed a single business activities [sic] tax like the one in Michigan. . . . Florida and Nevada came right to the edge of adopting one."

[3] See, generally, Hellerstein, *State Taxation* (Boston: Warren, Gorham & Lamont, 1983), pp 3-25.

development of local industry by means of taxing measures that 'invite a multiplication of preferential trade areas' within the United States, in contravention of the Commerce Clause." *Dean Milk Co* v *Madison*, 340 US 349, 356; 715 S Ct 295; 95 L Ed 329 (1951).

(4) **From a jurisprudential perspective, the Michigan Supreme Court majority in *Caterpillar* patently erred in ignoring long-standing principles that this Court has used to determine whether a legislative enactment violates the Commerce Clause.** Amici assemble before this Court to emphasize the necessity that Petitioner's petition for writ of certiorari be granted so that the Court may align this matter with the Commerce Clause principles outlined *infra*, and rectify the analytical errors extant in the opinion of the four-Justice majority of the Michigan Supreme Court in *Caterpillar*.

ARGUMENT

I. IN *CATERPILLAR*, THE MICHIGAN SUPREME COURT MAJORITY FAILED TO PROPERLY ANALYZE THE THIRD PRONG OF THE *COMPLETE AUTO* TEST, AND ACCORDINGLY IMPROPERLY HELD THAT NEITHER THE REAL NOR THE PERSONAL PROPERTY CAPITAL ACQUISITION DEDUCTION FOUND IN § 23 OF THE MICHIGAN SINGLE BUSINESS TAX ACT IMPERMISSIBLY DISCRIMINATES AGAINST INTERSTATE COMMERCE; THIS COURT SHOULD GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO CORRECT OBVIOUS DEFICIENCIES IN THE CONSTITUTIONAL ANALYSIS RENDERED BY THE MICHIGAN SUPREME COURT MAJORITY.

A. THE CAPITAL ACQUISITION DEDUCTION AND ITS FUNCTION IN THE CONTEXT OF MICHIGAN'S SINGLE BUSINESS TAX ACT.

The Michigan Single Business Tax Act ("SBTA"), 1975 PA 228, as amended, MCL 208.1 *et seq.*; MSA 7.558(1)

et seq., imposes a specific tax of 2.35% upon the adjusted tax base of every person with business activity within the State, MCL 208.31(1); MSA 7.558(31)(1). The computation of the single business tax base commences with federal taxable income as augmented and diminished by certain items enumerated in § 9 of the SBTA, MCL 208.9; MSA 7.558(9), including compensation paid (payroll and fringe benefits), depreciation deducted, interest, royalties and dividends paid, and other miscellaneous adjustments. See, *Mobil Oil Corp* v *Dep't of Treasury*, 422 Mich 473, 476; 373 NW2d 730 (1985). The principal federal tax deductions that the taxpayer must add back to federal taxable income in computing its single business tax base are compensation, consisting of wages and fringe benefits paid to employees, and depreciation. The depreciation add-back to the tax base required by SBTA § 9 is ameliorated by the provision of deductions for capital acquisitions in §§ 23(a) and (c) of the SBTA, MCL 208.23(a) and (c); MSA 7.558(23)(a) and (c). Thus, it has been observed that the SBTA "generally follows the consumption-type value-added tax treatment of capital acquisitions, which allows the taxpayer a deduction in the year of acquisition, and then to avoid a double deduction, adds to the SBT base the taxpayer's annual depreciation deduction," Kasischke, *Computation of the Michigan single business tax: Theory and mechanics*, 22 Wayne L Rev 1069, 1082-1083 (1976).

A taxpayer engaged in business activity both within and without Michigan is required to apportion its tax base under the provisions of Chapter 3 of the SBTA, MCL 208.41; MSA 7.558(41); the tax base subject to apportionment includes depreciation incurred in connection with all depreciable assets regardless of their location. Apportionment of the tax base occurs through application of a formula set forth in MCL 208.45; MSA 7.558(45), typical of those considered by this Court in its review of income-tax type cases, see, *e.g.*, *Butler Bros* v *McColgan*, 315 US

501; 62 S Ct 701; 86 L Ed 991 (1942); *Container Corp of America* v *Franchise Tax Board*, 463 US 199; 103 S Ct 2933; 77 L Ed 2d 545 (1983). This three-factor formula compares sales made, property used and payroll paid in Michigan to sales made, property used and payroll paid by the taxpayer everywhere, to produce an average apportionment percentage. The taxpayer's tax base then is multiplied by the resultant average apportionment percentage to approximate the portion of the taxpayer's business activity, defined in terms of tax base, attributable to Michigan.[4] The tax base apportionment formula is not drawn into question in *Caterpillar*.

The statutory capital acquisition deductions are invoked *after* the tax base (inclusive of depreciation) is computed and apportioned; each of the dual deductions authorized under SBTA §§ 23(a) and (c), one for tangible personal property, the other for real property, has been subjected to constitutional scrutiny by the Michigan Supreme Court in the case in which Petitioner requests the issuance of a writ of certiorari, *Caterpillar*. For the years considered by the Michigan Supreme Court in *Caterpillar*, the SBTA provides for a post-apportionment capital acquisition adjustment to the tax base in the year in which the property is placed in service; the personal property capital acquisition deduction is computed by applying a two-factor formula, consisting of the average of the property and payroll factors (two of the three components of the formula used to apportion the tax base

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[4] The familiar three-factor formula used to divide a taxpayer's tax base under the SBTA is depicted as follows:

$$\frac{\frac{\text{Michigan Property}}{\text{Total Property}} + \frac{\text{Michigan Payroll}}{\text{Total Payroll}} + \frac{\text{Michigan Sales}}{\text{Total Sales}}}{3} = \text{Average Apportionment Factor}$$

inclusive of depreciation) to the cost of tangible assets acquired by the taxpayer that are eligible for depreciation for federal income tax purposes, MCL 208.23(a); MSA 7.558(23)(a).[5] **In this analysis, it is significant that the property factor, as a ratio of Michigan property to property owned by the taxpayer everywhere, is directly affected by the extent of the taxpayer's presence in Michigan.** The other capital acquisition deduction available to a taxpayer in a post-apportionment setting under the SBTA, that authorized by MCL 208.23(c); MSA 7.558(23)(c), accords a taxpayer an unapportioned deduction for real property "located in Michigan."

The disproportionality of Michigan's capital acquisition deductions, and the degree to which these provisions inhibit the free flow of trade protected by the Commerce Clause, are self-evident.[6] However, it matters not whether the capital acquisition deductions are restrictive on their face, by design or in effect, for the result is the same: Both must be struck down on appeal as offensive to the time-honored precept that a State may not enact discriminatory measures premised upon the nature or location of business activity, *Kraft General Foods, Inc* v *Iowa Dep't of Revenue and Finance*, 505 US ___; 112 S Ct 2365; 120 L Ed 2d 59 (1992).

B. COMMERCE CLAUSE DOCTRINE AS ESTABLISHED BY THIS COURT'S PRECEDENTS.

Challenges to state tax legislation that invoke the Commerce Clause require resort to the following

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[5] Other requirements attend the capital acquisition deduction, but are not significant in the context of our discussion here.

[6] An extensive, cogent analysis of the discriminatory effects of the capital acquisition deduction scheme is set forth in the Appendix to Justice Cavanagh's lucid dissent in *Caterpillar*, see 440 Mich at 462-465.

principles: Under US Const, art I, § 8, cl 3, Congress is accorded the power "to regulate Commerce . . . among the several States." The Commerce Clause was fashioned "to create an area of free trade among the several states." *McLeod* v *J E Dilworth Co*, 322 US 327, 330; 64 S Ct 1023; 88 L Ed 1304 (1944). The tests applied to ascertain whether a particular statute offends the Commerce Clause were discussed by this Court in *Maryland* v *Louisiana*, 451 US 735, 754; 101 S Ct 2114; 68 L Ed 2d 576 (1980),

> [A] state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. *Complete Auto Transit, Inc* v *Brady*, 430 U.S. 274 (1977). See *Western Live Stock* v *Bureau of Revenue*, 303 U.S. 250 (1938). The state's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Washington Revenue Dept* v *Washington Stevedoring Assn*, 435 U.S. 734, 750 (1978).[7]

In ascertaining whether a Commerce Clause violation exists, a Court must examine the pertinent language of each statute on a case-by-case basis, see *Northwestern States Portland Cement Co* v *Minnesota*, 358 US 450, 457; 79 S Ct 357; 3 L Ed 2d 421 (1959), and must discern the "practical effect" the legislation has upon interstate commerce, *Maryland* v *Louisiana, supra*. Thus, while a statutory enactment outwardly may appear to promote the laudatory goal of augmenting a State's tax base by

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[7] The four-part test attributed to *Washington Stevedoring Ass'n* was first outlined in *Complete Auto Transit, Inc* v *Brady*, 430 US 274; 97 S Ct 1067; 51 L Ed 2d 326 (1977), and is referred to in this brief as the *"Complete Auto"* test.

encouraging businesses to locate their real and personal property acquisitions within the State, the focus of a reviewing court must be upon that which, in reality, is at the core of the legislation: the relevant query is whether, once exposed, the "actuality of operation of the tax" as a whole or as to one of its component features discriminates in violation of the Commerce Clause, see *Halliburton Oil Well Cementing Co* v *Reily*, 373 US 64, 69; 83 S Ct 1201; 10 L Ed 2d 202 (1963).

A guiding principle in Commerce Clause jurisprudence is that:

> [n]o State may, consistent with the Commerce Clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." [citations omitted] The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Boston Stock Exchange* v *State Tax Comm*, 429 US 318, 329; 97 S Ct 599; 50 L Ed 2d 514 (1977).

Clearly, "[a]bsent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against commerce. See, *Philadelphia* v *New Jersey*, 437 US 617, 626-628, 57 L Ed 2d 475, 98 S Ct 2531 (1978); *Maine* v *Taylor*, 477 US 131, 148, n 19, 91 L Ed 2d 110, 106 S Ct 2440 (1986)," *Kraft*, 120 L Ed 2d at 69.

The burden of showing that "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism" rests with the governmental authority, *Wyoming* v *Oklahoma*, 502 US ___; 112 S Ct 789; 117 L Ed 2d 1, 22 (1992). This Court has not required that cases that patently evince discrimination be remanded for

an evidentiary determination concerning the extent to which unequal treatment has occurred. Indeed, this Court has proposed that it "need not know how unequal the tax is before concluding that it unconstitutionally discriminates," *Maryland* v *Louisiana*, 451 US at 604, and has further acknowledged that "when the state statute amounts to simple economic protectionism, a 'virtually per se rule of invalidity' has applied." *Wyoming* v *Oklahoma*, 117 L Ed 2d at 22.

In its continuing commitment to circumscribe the limits imposed by the Commerce Clause upon the power of the States to tax, this Court has convincingly defeated enactments that either facially or operatively confer greater benefits upon business taxpayers by virtue of the location in which their activities take place. Thus, although "the Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses . . . ', *Amerada Hess Corp.* v *Director, N.J. Taxation Division*, 490 US 66, 78, 104 L Ed 2d 58, 109 S Ct 1617 (1989)," *Kraft*, 120 L Ed 2d at 67, it also is clear that the Commerce Clause is adversely implicated when a State makes distinctions on the basis of the locations of corporate activities. **It is difficult to imagine tax provisions more locational in nature than the property factor, which measures the proportional *presence* of property within Michigan by dividing property *located* within the state by property *located* everywhere, and the payroll factor, which measures the proportional *presence* of employees within Michigan by dividing payroll paid to employees *located* within Michigan by payroll paid to employees *located* everywhere. The same can be said for the § 23(c) provision restricting the real property capital acquisition deduction to property actually *located* within Michigan.** Following is a brief sampling of several highly pertinent cases that collectively demonstrate the constitutional infirmities attendant to location-

based tax enactments akin to the capital acquisition deductions contested in *Caterpillar*.

In a case that stands at the forefront, *Westinghouse Electric Corp* v *Tully*, 466 US 388; 104 S Ct 1856; 80 L Ed 2d 388 (1984), a unanimous Court considered the constitutional validity of a tax measure implemented by the New York legislature to fend off losses to State revenues engendered by creatures of federal law known as Domestic International Sales Corporations (DISCs), see 26 USC §§ 991-997. In enacting this legislation, New York was concerned not only about declining State revenues in the event DISC entities escaped taxation in that State, but also about the effect its decision to subject the DISCs to tax would have upon incentive to businesses to locate and manufacture export goods in New York. With these concerns in mind, the legislature required that the accumulated income of the DISC be added to that of its parent and, in addition, provided a credit lowering the tax rate, but only as to gross receipts from export products shipped from the taxpayer's regular place of business in New York.

Westinghouse, the owner of a DISC that made a relatively small quantity of shipments from New York locations, excluded the DISC's accumulated income from its consolidated returns, prompting the New York taxing authority to assess franchise tax deficiencies. Westinghouse proffered several objections to the assessment, including a contention that the legislative determination to extend a credit for gross receipts relating to shipments from New York violated the Commerce Clause.

The discriminatory feature of New York's credit was that it "ha[d] the effect of treating differently parent corporations that are similarly situated in all respects" save for the percentage of the DISC's shipments out of New York. In this manner, the tax credit available to a taxpayer was enhanced to the extent that the DISC shifted its activities from other States to New York. This

Court ruled that, in favoring local interests to the exclusion of enterprises engaged in free trade among the States, New York's DISC credit facially – and illegitimately – discriminated against interstate commerce.

Similarly, in *Boston Stock Exchange, supra,* the Court reviewed an amendment to legislation governing the New York transfer tax that reduced the tax rate applicable to nonresidents for sales made in New York and which, for residents and nonresidents alike, provided a ceiling on the tax due on in-state transactions. The legislative history of the amendment disclosed that it was promulgated to foster securities transactions within New York on the part of nonresidents, and, in so doing, to increase the likelihood that the New York Stock Exchange would remain within the State.

Regional stock exchanges challenged the amendatory measure on grounds that it unlawfully discriminated against interstate commerce. This Court concurred, rejecting the State's contention that the statutory amendment was compensatory in nature, intended solely to neutralize the competitive advantage the pre-amendment language conferred upon out-of-state stock exchanges, and concluding that the discrimination worked by this location-based amendment contravened the policy that is at the heart of the Commerce Clause, the facilitation of unrestrained trade among the States.

Another case, *Maryland* v *Louisiana, supra,* falls into line with a string of other cases that teach and reaffirm that legislative acts that enhance in-state investment while shifting the tax burden[8] to enterprises that have chosen to produce or locate elsewhere cannot be tolerated under the

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[8] A tax shift *does* occur under the SBTA. Federal depreciation deductions are included in the single business tax base to avoid the double deduction of asset consumption costs which would otherwise occur because the capital acquisition deductions are allowed at the time depreciable assets are acquired.

Commerce Clause. *Maryland* v *Louisiana*, involved the constitutional vitality of Louisiana's First-Use Tax, which was imposed on various activities relating to natural gas production and which professedly was intended to compensate the people of Louisiana for environmental damage, to protect certain natural resources, and to place Louisiana gas producers on par with competing producers elsewhere. This Court invalidated the First-Use Tax under the Commerce Clause, finding fault with those features of the tax which, in the Court's estimation, had the effect of either favoring investment in Louisiana, or of removing the economic burden of the tax from gas remaining in Louisiana for consumption.

Kasischke, *supra*, 5. Thus, the allowance of capital acquisition deductions and the add-back of federal depreciation deductions are inexorably linked to a single activity, **the acquisition and consumption of depreciable property.**

However, because depreciation deductions are apportioned to Michigan using the average of the ratio of in-state property, payroll **and sales** to property, payroll **and sales** everywhere, while the single business tax write-off allowed for the acquisition of tangible personal property is apportioned to Michigan using only the property and payroll factors, a Michigan-based company obtains a higher initial capital acquisition deduction because its property and payroll factors necessarily reflect more intensive activity within this State, and, to the extent the company makes sales outside of Michigan, its tax base including depreciation is apportioned (*i.e.*, shifted) outside of Michigan to sales destination states where items such as depreciation are not subject to tax, through application of a formula which considers sales. Similarly, a company based outside of Michigan is accorded a low initial capital acquisition deduction because its property and payroll factors do not reflect intensive activity in Michigan, although its tax base inclusive of depreciation is apportioned (*i.e.*, shifted) into Michigan because the method by which the company's tax base is apportioned also considers sales.

Several other modern decisions of this Court unmistakably bespeak a distinct disapproval of discriminatory tax provisions reflective of a State's protective posture toward identifiable segments of commerce. For example, in *Bacchus Imports Ltd* v *Dias*, 468 US 263; 104 S Ct 3049; 82 L Ed 2d 200 (1984), this Court, in analyzing a Commerce Clause attack advanced by the taxpayer, confirmed that States may not enact tax provisions that have the effect of favoring local businesses over competing interstate entities. The Court observed that, just as discriminatory State statutes enacted for protectionist purposes have been struck down as constitutionally abhorrent, statutes disclosing a policy of favoring isolated segments of business at the expense of others, so as to effectively force certain components of interstate business to subsidize a tax-free status enjoyed by others, must be declared invalid. This dismemberment of the concept of "economic protectionism" in essence means that the State is precluded from creating favored tax strata within its borders that favor one business operation over another, either on the basis of the character of the business or its location. Also noteworthy are *American Trucking Associations, Inc* v *Scheiner*, 483 US 226; 107 S Ct 2829; 97 L Ed 2d 226 (1987), in which the Court repudiated a Pennsylvania flat highway tax exempting in-state registered vehicles on grounds that it discriminates against interstate motor carriers in violation of the Commerce Clause; *Tyler Pipe Industries, Inc* v *Washington Dep't of Revenue*, 483 US 232; 107 S Ct 2810; 97 L Ed 2d 199 (1987), in which the Court invalidated a manufacturing tax imposed only on in-state goods sold to out-of-state purchasers as facially discriminatory against interstate commerce; and *Armco Inc* v *Hardesty*, 467 US 638, 642; 104 S Ct 2620; 81 L Ed 2d 540 (1984), in which the Court, in holding that burdensome taxes exclusively imposed upon interstate commerce are forbidden, proposed that, "a State may not tax a transaction or incident

more heavily when it crosses state lines than when it occurs entirely within the state."

Even more recent confirmation of the Court's continued disavowal of inclinations on the part of States to foster protectionist legislation, *i.e.*, legislation that bestows favored status upon an entity on the basis of its location, and its absolute commitment to the principles advanced by the "dormant" or "negative" Commerce Clause, can be garnered from several significant decisions issued by the Court during its October, 1991 Term. Thus, in *Kraft, supra*, the Court focused upon facial challenges tendered under the Foreign Commerce Clause to an Iowa income tax statute that taxed dividends received by Kraft from its foreign subsidiaries, but exempted from taxation dividends issued by domestic subsidiaries. Led by Justice Stevens, this Court held that the differential treatment accorded by Iowa to dividends received from subsidiaries located outside the United States represented an impermissible encroachment upon the power accorded Congress to regulate foreign commerce. In *Fort Gratiot Landfill, Inc* v *Michigan Dep't of Natural Resources*, 504 US ___ ; 112 S Ct 2019; 119 L Ed 2d 139 (1992), the Court reaffirmed that:

> [T]he Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.' *H.P. Hood & Sons, Inc* v *Du Mond*, 336 US 525, 535; 69 S Ct 657; 93 L Ed 865 (1949). A state statute that clearly discriminates against interstate commerce is therefore unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' *New Energy Co. of Indiana* v *Limbach*, 486 US 269, 274; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Finally, in *Chemical Waste Management, Inc* v *Hunt*, 504 US ___; 112 S Ct 2009; 119 L Ed 2d 121 (1992), a majority of

this Court, quoting extensively from *Fort Gratiot*, reiterated the notion grounded in the constitution that States may not legislate in a manner that violates the preeminent and pervasive principle of nondiscrimination.

C. THE MICHIGAN SUPREME COURT MAJORITY'S MISAPPLICATION OF ACCEPTED COMMERCE CLAUSE JURISPRUDENCE IN *CATERPILLAR*.

The rationale offered by the four-Justice majority of the Michigan Supreme Court in *Caterpillar* represents an erroneous and objectionable analysis under the Commerce Clause for a host of reasons; clearly, this matter warrants a studied review on the part of this Court subsequent to a grant of Petitioner's petition for writ of certiorari.

As *Westinghouse, supra*, dictates, there is nothing patently wrong with the fact that the Michigan legislature opted to accord entities subject to the single business tax a deduction for real and personal capital acquisitions; what cannot be condoned, **and what the Michigan Supreme Court majority unquestionably failed to account for**, is the basis upon which the deductions are formulated and the manner in which they **intentionally, facially and in effect** discriminate against interstate commerce. The Michigan Supreme Court's determination to accord the capital acquisition deductions an imprimatur of validity under the Commerce Clause on grounds that they are "investment incentives" bespeaks a wholesale disregard for the "practical effect" that such deductions have upon interstate commerce, *Maryland* v *Louisiana, supra*.

The Michigan Supreme Court majority's conclusion that no "facial discrimination" exists because the capital acquisition deductions are available to both Michigan and non-Michigan taxpayers is, at the same time, both overly

simplistic and entirely wrong. The error of this analysis is easily demonstrated by reference to *Westinghouse, supra,* in which the New York DISC credit considered by the Court was available to all taxpayers, but nevertheless was proclaimed by this Court to be part of a legislative scheme that was discriminatory on its face. That a taxpayer may have broad access to a deduction or exemption does not stand in the way of a conclusion that a particular statute facially discriminates against interstate commerce.

Likewise, the Michigan Supreme Court majority erred in concluding that the capital acquisition deductions evince no discriminatory purpose on the part of the Michigan legislature. The intentional and unmistakable in-state orientation of the capital acquisition deductions was alluded to in literature addressed to the single business tax published at the virtual inception of this unique tax; thus, one early insightful commentator described the capital acquisition provisions as *"purposefully designed to favor investments located in Michigan"* (emphasis supplied), Haughey, *The economic logic of the single business tax,* 22 Wayne L Rev 1017, 1027 (1976).

Another objectionable facet of the Michigan Supreme Court majority's decision in *Caterpillar* stems from the Court's eagerness to seize upon language culled from this Court's opinion in *Trinova Corp* v *Michigan Dep't of Treasury,* 498 US ___; 111 S Ct 818; 112 L Ed 2d 884 (1991), as providing support for a conclusion that the capital acquisition deductions do not offend established commerce clause principles. While it is true that in *Trinova, supra,* this Court, quoting *Boston Stock Exchange,* 429 US at 336-337, did speak of the "laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state", suffice it to say that *Trinova, supra* did not consider allegations of discrimination under the Commerce Clause in the specific context of the capital acquisition deductions that have been brought to this Court's attention in *Caterpillar.*

Moreover, the mere recognition on the part of the Michigan Supreme Court majority of the "laudatory goal" to be served by enactments designed to promote in-state investment begs the question: however beneficial it may be to enhance investment in a State, this goal must **always** give way to established Commerce Clause principles that prohibit the States from promulgating discriminatory legislation favoring in-state activities over those that occur outside their borders. Reasonable alternatives have long been available to the Michigan legislature to effect the same goals without running afoul of cherished constitutional dictates.

As has been noted, the burden of showing that "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism" rests with the Michigan Department of Treasury in this case, *Wyoming* v *Oklahoma, supra*. In the estimation of amici, Michigan has not, and cannot possibly, proffer a rationale for the discrimination inherent in the capital acquisition deductions sufficiently cogent to withstand Commerce Clause scrutiny. Although it may be possible for a State to justify legislation that discriminates against the free flow of commerce on health and welfare grounds, see, *e.g.*, *Maine* v *Taylor, supra*, no goal of this nature can be advanced in *Caterpillar* to legitimize the rank discrimination evident in Michigan's capital acquisition deduction scheme under the SBTA.

SUMMARY OF ARGUMENT

A wealth of decisions rendered by this Court stand for the proposition that discrimination on the part of a State based on the location or nature of business activity is absolutely prohibited under the Commerce Clause. *Kraft*, 120 L Ed 2d at 69. The methodologies used to

compute the capital acquisition deductions turn exclusively on locational features – property and employees *located* in Michigan. A state tax provision discriminates in violation of the Commerce Clause if business concerns operating in interstate commerce are made to assume a greater tax burden in relationship to intrastate commerce. While a State may attempt to justify a discriminatory enactment on grounds that it serves venerable police power interests, discriminatory legislation that merely purports to serve the laudable goal of fostering in-state investment cannot withstand Commerce Clause scrutiny; indeed, it is the "economic protectionism" engendered by over-zealous attempts on the part of States to enhance business activities within their borders that the Commerce Clause exists to proscribe.

CONCLUSION

Michigan is not precluded "from structuring [its] tax systems to encourage the growth and development of intrastate commerce and industry," nor is it prevented from "compet[ing] with other states for a share of interstate commerce"; however, it also is eminently clear that, in entering the fray of competition for business development, Michigan is obligated to abide by the dictate that "[n]o State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange*, 429 US at 329. As experienced by Petitioner Caterpillar, as well as by amici who have gathered before the Court to support Petitioner's request that a writ of certiorari issue in this matter, the systematic application of the capital acquisition deductions found in the SBTA distinctly prefers Michigan-sited businesses and, in so doing, impermissibly shifts a greater share of the burden of the single

business tax upon multistate businesses transacting business in interstate commerce. Even a cursory reading of the opinion issued by the bare majority of the Michigan Supreme Court in *Caterpillar*, in light of the well-articulated Commerce Clause principles evident in a multiplicity of this Court's pronouncements, compels the conclusion that the SBTA's capital acquisition deductions invidiously discriminate against interstate commerce either facially, purposefully or effectively, and thereby fail the third prong of the *Complete Auto* test. As this Court observed in *Chemical Waste Management*, 119 L Ed 2d at 132, "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry. See, e.g., Westinghouse Electric Corp v Tully, 466 US 388, 406-407; 104 S Ct 1856; 80 L Ed 2d 388 (1984); Maryland v Louisiana, 451 US 725, 759-760; 101 S Ct 2114; 68 L Ed 2d 576 (1981); Boston Stock Exchange v State Tax Comm, 429 US 318, 336-337; 97 S Ct 599; 50 L Ed 2d 514 (1977)." This Court should undertake review of this matter to strike down without further inquiry the discriminatory capital acquisition deductions, thus ensuring that the erroneous legal determination of the majority of the Michigan Supreme Court in *Caterpillar* is corrected in a manner that comports with the dictates of the Commerce Clause.

Respectfully submitted,

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